



**CALIFORNIA
ENERGY
COMMISSION**

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ORDER GRANTING EXTENSION OF TIME FOR DISCOVERY

SOUTH BAY REPLACEMENT PROJECT
APPLICATION FOR CERTIFICATION
DOCKET NO. 06-AFC-3

Background

CURE

On February 15, 2007, Intervenor, California Unions for Reliable Energy (CURE), filed its *Request for Extension of Time to Submit Data Requests* stating that Section 1716(e) of the Energy Commission's Regulations [Title 20, § 1716(e)] limits the time for submitting Data Requests to 180 days after the Commission's determination that an Application for Certification is complete. CURE stated that it is currently analyzing the Applicant's first set of air quality data responses to the Energy Commission Staff, filed February 14, 2007, and it is preparing follow-up air quality data requests. In addition, CURE stated that it has requested information from the files of the Department of Toxic Substances Control (DTSC) regarding prior remediation, if any, on the proposed power plant site for the purpose of preparing Data Requests to the Applicant. CURE stated that the DTSC is gathering the requested files and that the information is not yet available to CURE. CURE stated that without an extension of time for discovery beyond February 26, 2007, it will be unable to pursue the production of information it asserts to be relevant to the proceeding.

Notwithstanding its *Request for Extension*, CURE filed Data Requests on February 26, 2007, with 55 items addressing Air Quality, Public Health, Noise, and Geology.

Energy Commission Staff

On February 21, 2007, the Energy Commission Staff filed its *Staff's Request for Extension of Time to Submit Further Data Requests* so that the Staff may submit follow-up Data Requests on Air Quality, Biological Resources, Water Resources, Cultural Resources, and Land Use. Staff noted that it had scheduled a public Data Response Workshop on February 26, 2007, to discuss the Applicant's Data Responses filed on February 14th. On the basis of clarifications expected at the Workshop, Staff would decide what additional Data Requests it would tender to the Applicant. However, the Staff Data Response Workshop scheduled for February 26, 2007, was cancelled by the Staff at the request of the Applicant.

Notwithstanding its *Request for Extension*, Staff filed Data Requests on February 23, 2007, with 12 items addressing Biology, Cultural resources and Soils/Water Resources.

Environmental Health Coalition

Also on similar grounds, Intervenor Environmental Health Coalition (EHC) filed its *Request for Extension of Time to Submit Data Requests*, on February 22, 2007. The EHC stated that the Commission Staff has advised the EHC to refrain from submitting Data Requests until the Staff Data Requests and Responses were complete. The EHC further stated that, due to the cancellation of the February 26th Workshop, it needed additional time to prepare Data Requests since it would not have any clarifying information from the Workshop to aid in the preparation of any Data Requests.

Additionally, EHC recounted that at a January 18, 2007, public workshop conducted jointly by the City of Chula Vista and the San Diego Unified Port District, the Port Commissioners stated that they would not enter into a lease/option agreement allowing the Applicant to construct the project as proposed in the Application for Certification if the City of Chula Vista disapproved. The EHC noted that on February 20, 2007, the Chula Vista City Council unanimously expressed opposition to the project at the proposed site. The EHC expressed its belief that the Port Commission was expected to consider the project site lease/option agreement in mid-March. Consequently, the EHC suggested an extension of time for discovery until March 26, 2007, so that the issue of site control would perhaps become more clarified before additional public and private resources are expended on discovery.

Notwithstanding its *Request for Extension*, the EHC filed two sets of Data Requests on February 23, 2007. The first set of EHC Data Requests was directed to the Applicant, with 29 items addressing Electricity Sales, Environmental Hazards, Air Quality, and Alternatives. The EHC stated that it had not submitted Data Requests related to the latest air quality modeling from the Applicant, since it did not have the CD containing the Applicant's modeling data as of February 23rd. The EHC stated that it would have additional Data Requests to be based upon that modeling data once it was provided and analyzed. The second set of EHC Data Requests was directed to the Commission Staff, with 10 items addressing Cal-ISO contract provisions and requirements.

LSP South Bay

On March 2, 2007, the Applicant, LSP South Bay, filed its opposition to the CURE and EHC Requests for Extension of Time. LSP South Bay disputed the Intervenor's assertions that its Data Responses had been delayed and were not timely, instead claiming that its Data Responses were made in accordance with a schedule that was revised as circumstances warranted, including a request by the San Diego Air Pollution Control District to remodel the air quality analyses with newly available data. Given its purported diligence and timely responses, LSP South Bay opposes the requested extensions of time for discovery, and alternatively suggests that if an extension is granted it be limited to only the air quality matters addressed in the revised air quality analysis, and the extension be limited to 14 days, not 28 days. LSP has not filed any opposition to the Commission Staff Request for Extension.

On March 5, 2007, LSP South Bay filed its *Notice of Objection to Certain CEC Data Requests*, specifically objecting to two of Staff's Data Requests. LSP South Bay contemporaneously filed its *Notice of Objection to Certain EHC Data Requests*, specifically objecting to 17 of EHC's 29 Data Requests. Although most of the LSP South Bay objections are on grounds of relevance, the Applicant also objects to some Data Requests as burdensome since they would require the expenditure of substantial resources to prepare.

Committee Discussion

Under most conditions, the conclusion of discovery in an Application for Certification should occur approximately halfway through the one-year schedule for completion of the proceeding. At the Informational Hearing on September 15, 2006, Commission Staff presented a suggested schedule which would have had initial Data Requests filed September 29, 2006, with the Applicant's Data Responses to be filed on October 31, 2006. Staff also suggested that a second round of Data Requests and Data Responses would occur November 30th and December 22nd, respectively. The actual dates, however, for the first round of discovery had Staff's Data Requests filed on October 31, 2006, with Data Response set 1A filed by the Applicant on November 29, 2006, and Data Response set 1B on February 14, 2007. Staff's second round of Data Requests was filed on February 23, 2007, and is pending responses.

Occasionally, and in this South Bay Replacement Project proceeding, the discovery process will not be complete in 180 days, whether due to the Applicant's needing more time to produce Data Responses, the need for a second round of Data Requests, or some unforeseen circumstances. Ordinarily, Staff workshops on discovery issues are a helpful means to address such problems.

The cancellation of the Staff's second Data Response Workshop on February 26, 2007, at the Applicant's request, has deprived the parties of an opportunity to discuss discovery matters among themselves. CURE, Staff, and the EHC requested extensions through March 26, 2007. The Committee believes that, in light of the cancellation of the Data Response Workshop, the Staff and Intervenor should be afforded an extension of time for Data Requests on air quality matters arising from the Applicant's February 14th Data Response filing. In light of the types of information sought in the Data Requests filed by the Staff, CURE, and the EHC prior to February 26, 2007, the Committee believes that the extension of time for discovery is appropriately limited to air quality matters as described above.

The Committee is not addressing herein the Applicant's objections to certain Data Requests of the Staff, CURE, and EHC, since the procedure to obtain information [Title 20, 1716(g)] has not been pursued by the requesting parties as of the date of this Order.

Order

It is therefore ORDERED that the Staff, CURE, and Environmental Health Coalition Requests for Extension of Time to Submit Data Requests beyond February 26, 2007, are granted as to Data Requests related to the Applicant's February 14, 2007, air quality Data Responses. Data Requests must be filed on or before March 26, 2007.

Dated: March 9, 2007

ENERGY RESOURCES CONSERVATION AND
DEVELOPMENT COMMISSION

/s/

JOHN L. GEESMAN
Commissioner and Presiding Member
South Bay AFC Committee

/s/

ARTHUR H. ROSENFELD
Commissioner and Associate Member
South Bay AFC Committee